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No. 93-1322

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLAVIO CORNEJO PUIG-MIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in excusing a prospective juror for cause.

2. Whether petitioner's Sixth Amendment right to confront the witnesses against him was impermissibly restricted.

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OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 9 F.3d 1546 (Table).

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. The petition for certiorari was filed on February 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to commit money laundering, in violation of 18 U.S.C. 371, and two counts of aiding and abetting money laundering, in violation of 18 U.S.C. 1956(a)(1)(A) and 18 U.S.C. 2. The district court sentenced petitioner to a total of 151 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. In February 1990, the United States Customs Service opened "Caribe Import-Export and Investments" as part of an undercover money laundering investigation. Customs Service agents recruited Jay Zaden, a Colombian national who had provided information to the Customs Service in the past, to operate the money laundering business. Gov't C.A. Br. 3.

Petitioner met Zaden in Miami, and after learning about Caribe, asked him what it could do for petitioner. Gov't C.A. Br. 3. Zaden replied that he could receive drug monies in Houston and funnel that money into South American bank accounts. He further explained that petitioner could be provided with private bank accounts if he so desired. Petitioner stated that his main business partner was in Cali, Colombia, and was "one of the biggest persons in the Cali [cocaine] cartel." *Ibid.* Petitioner showed Zaden a bank statement listing an account containing in excess of $100 million; the cartel had substantial amounts of cash to be laundered. Gov't C.A. Br. 3.

Petitioner, who expressed concern about being apprehended by the authorities, traveled to Houston with Zaden to see the money laundering operation. Zaden explained in detail the manner in which the money would

be laundered. Petitioner expressed his satisfaction and subsequently arranged a transaction with Zaden. After an initial attempt was aborted, Zaden and the undercover agents successfully laundered approximately $500,000 for petitioner. Several other transactions were arranged, and petitioner promised that the flow of money would continue and that the agents could expect significantly more than $500,000 per week. Gov't C.A. Br. 13.

Petitioner ultimately engaged in a number of other transactions with Zaden and the undercover agents, through which he laundered hundreds of thousands of dollars in drug money. In December 1990, the undercover operation was closed, and on October 7, 1991, petitioner was arrested. Gov't C.A. Br. 5-19.

2. During jury voir dire, the district court asked whether any prospective juror knew the defense attorney. One venire member, Cynthia Weiss, responded that she did. At a bench conference, Weiss stated that, about two years earlier, defense counsel had represented her son on charges of cocaine trafficking. C.A. Record Excerpts (R.E.) Tab G, at 1-39. She further informed the court that her son had pleaded guilty and had received a sentence of five to ten years' imprisonment, of which he served six months. When asked whether her son "got a fair shake by the prosecutors and the law enforcement," Weiss responded, "[n]ot by the district attorney and all, no." *Id.* at 1-40. When questioned further, she stated that she "just felt like they were really out to get" her son. *Ibid.* Weiss indicated that she believed that, given her son's age and the fact that this was his first offense, the prosecutor should have been more lenient. *Ibid.*

Weiss indicated that she understood that this was a money laundering case involving the proceeds from cocaine trafficking. She also stated that she could find the defendant guilty if the government proved its case

beyond a reasonable doubt, decide the issues based on the evidence, and follow the court's instructions. Nevertheless, Weiss hesitated when specifically asked by the court whether she could set aside her son's experience if she were selected as a juror in this case:

> COURT: Will you be able to put that [her son's experience] out of your mind if you are selected as a juror and base your decision in this case solely on the evidence you hear in this courtroom and on my instructions concerning the law?
>
> WEISS: I'm not sure. I'm just not sure about that.

R.E. Tab G, at 1-41 to 1-42. The prosecutor then asked "[b]ecause of your son being caught * * * do you think you would have some type of resentment that may be way down deep inside of you that may cause you a few problems?" *Id.* at 1-42. Weiss replied: "I still have a lot of resentment, yes. I do." *Ibid.*

Defense counsel attempted to rehabilitate Weiss, asking if she could set her resentment aside, hear the evidence, and "if the prosecutor proves his case to you beyond a reasonable doubt, * * * come with a verdict of guilty?" R.E. Tab G, at 1-42. She replied "[y]es." *Ibid.* The district court nevertheless found that, based on Weiss's demeanor in answering the questions, her experiences had compromised her impartiality. Accordingly, the court excused her for cause. The court explained that although defense counsel "attempted to rehabilitate her[,] * * * her candid answers to my questions indicated that she had difficulty being fair and impartial." *Id.* at 1-43.

3. At trial, the government offered the testimony of informant Jay Zaden. Zaden testified extensively concerning the undercover money laundering operation.

During cross-examination, defense counsel established that Zaden was a Colombian national who had been granted leave to remain in the United States by the government, that he had received some $5,000 for acting as an informant for the Customs Service, and that he started assisting the Customs Service approximately three and one-half years before the present case. When defense counsel asked Zaden whether the Caribe operation was his first money laundering case, the government objected on the grounds that "he may be inquiring into areas that impinge on the witness' safety." Gov't C.A. Br. 27. The court nevertheless permitted further questioning on these matters. *Id.* at 27-28.

Further questioning revealed that "Zaden" was not the witness's birth name and that he had engaged in prior criminal activity. Defense counsel sought to elicit Zaden's birth name, but the government objected. The government informed the court that it had disclosed all of Zaden's prior criminal activity and that disclosing Zaden's birth name, which he had changed to protect his own safety and that of his family, would jeopardize those interests. Gov't C.A. Br. 28. The court ordered the government to present the matter *in camera*. *Ibid.*

The court reviewed Zaden's affidavits, a report on his prior criminal activity, and the government's file on Zaden. Based on that review, the court weighed the government's interest in investigating future criminal activity and Zaden's personal security, on the one hand, against the defendant's interest in knowing Zaden's birth name or the location of his past criminal and informant activities, on the other. The court concluded that the balance favored nondisclosure of Zaden's identity. The court, however, disclosed to petitioner Zaden's criminal record, that Zaden had previously served as an informant, and that Zaden had received between $40,000

and $50,000 from the Customs Service for his work as an informant. The court expressly advised defense counsel that he could not ask Zaden where he had been arrested, but could examine him concerning the particulars of his crime. The court also permitted defense counsel to question Zaden about his tax returns and whether he reported his earnings as a confidential informant. Gov't C.A. Br. 29-31.

At trial, petitioner's counsel established that Zaden had received $54,000 for the operation involved in this case, that he had not reported his past earnings as a confidential informant on his tax returns, and that he had been convicted of shoplifting. Defense counsel also established that Zaden had been arrested for price tag switching, but that the case had been dismissed at the request of Customs Service agents. Defense counsel was also permitted to question Zaden about any matter pertaining to the present investigation. Counsel was prevented only from inquiring about Zaden's birth name and the location of his prior arrests and service as an informant. Gov't C.A. Br. 31-33.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court rejected petitioner's claim that the district court erred in dismissing venire member Cynthia Weiss for cause. Relying on *United States* v. *Prati*, 861 F.2d 82, 87 (5th Cir. 1988), the court found that even if the district court did err, "the error does not warrant reversal of [petitioner's] conviction."[1] Pet. App. 3a. The court explained that "[a]bsent a challenge to the jury's impartiality and an assertion that [petitioner's] rights were

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[1] The court made clear that it was not suggesting that error had occurred, and it reaffirmed the broad discretion of the trial court to determine whether a juror harbors actual bias. Pet. App. 3a n.2.

prejudiced," the exclusion of a juror, even if erroneous, does not violate the Sixth Amendment. *Ibid.*

The court also held that the district court had not improperly restricted petitioner's cross-examination of Zaden. Pet. App. 4a-5a. The court observed that "information related to Zaden's criminal activities and [his] activities as a paid informant for the Customs Service" was revealed to defense counsel. *Id.* at 5a. After reviewing other information about Zaden that the district court had placed under seal, the court concluded that the district court did not abuse its discretion in withholding that information from petitioner.[2] *Ibid.*

ARGUMENT

1. Petitioner argues that the trial court abused its discretion in excusing a prospective juror for cause and that the erroneous exclusion permitted the government an unfair advantage in selecting the jury. Pet. 4-10. He further contends that the Fifth Circuit in *United States* v. *Prati*, 861 F.2d 82 (1988), misinterpreted this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988).

a. The Sixth Amendment right to a jury trial guarantees the accused a trial by a panel of impartial jurors. *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The trial judge is primarily responsible for protecting the right to an impartial jury. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188-189 (1980); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 555 (1976). Since the question of the impartiality of an individual juror is "essentially one of

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[2] The court of appeals also rejected petitioner's claims that certain recorded conversations were improperly admitted into evidence (Pet. App. 3a-4a) and that he should have been given a reduction under Sentencing Guidelines § 5K2.0 for "exceptional circumstances." Pet. App. 5a. Petitioner does not renew either of those claims before this Court.

credibility, and therefore largely one of demeanor," the trial court's determination is due "special deference" (*Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984)), and may "be overturned only for 'manifest error'" (*id.* at 1031 (quoting *Irvin*, 366 U.S. at 723)). See also *Mu'Min* v. *Virginia*, 111 S. Ct. 1899, 1904-1906 (1991).

The trial court did not commit "manifest error" in excusing prospective juror Cynthia Weiss for cause. Weiss stated that she knew petitioner's counsel because he had represented her son on cocaine trafficking charges. She recounted her view that the prosecutor had not treated her son fairly and that the government was "really out to get" him. R.E. Tab G, at 1-40. When asked whether she could put aside her personal feelings and decide the case on the facts presented, she admitted that she harbored resentment against the criminal justice system and doubted whether she could set that resentment aside. Despite defense counsel's attempts at rehabilitation, the court concluded, based on its observation of Weiss's demeanor and her candid answers to the court, that she would not be able to render impartial service. Far from committing error, the trial court properly excused Weiss for cause. See 28 U.S.C. 1866(c)(2) (a juror may be excluded by the court on the ground that such person may be unable to render impartial jury service).

b. Contrary to petitioner's assertion, *United States* v. *Prati*, *supra*, is consistent with this Court's decision in *Ross* v. *Oklahoma*, *supra*. In *Ross*, the trial court failed to excuse a prospective juror for cause under *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). The defense counsel therefore used one of his peremptory challenges to remove the venire member. The Court, however, "reject[ed] the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. "So long as

the jury that sits is impartial," the Court explained, "the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ibid.* Because the defendant in *Ross* never claimed that the jury he received was biased, the Court found no Sixth Amendment violation. *Id.* at 85-88.

In *Prati*, the trial court erroneously excused a prospective juror for cause. As a result, the government effectively received an additional peremptory challenge. The Fifth Circuit, relying on *Ross*, explained that such an error would require reversal only in an exceptional case. Ordinarily, the improper removal of a prospective juror, without more, would not violate the Sixth Amendment, provided that the jurors who served on the panel were "impartial." 861 F.2d at 87. Nothing in that analysis conflicts with *Ross*. *Prati*, like *Ross*, focused on whether the defendant received a trial by an impartial jury. Since the defendant in *Prati* did not claim that the jury he received was biased, the court of appeals found that the removal of the venire member (even if error) was not a basis for reversing the defendant's convictions.[3] *Ibid.*

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[3] Petitioner suggests (Pet. 8-9) that the Court should apply the principle here that "the erroneous exclusion of even one venireman upon Government challenge merits reversal, regardless of the eventual makeup of the actual jury." In the cases cited by petitioner, Pet. 8, the Court held only that "the Constitution disentitles the State to execute a sentence of death imposed by a jury from which * * * prospective jurors [who were not irrevocably opposed to the death penalty] have been excluded." *Adams* v. *Texas*, 448 U.S. 38, 51 (1980); *Davis* v. *Georgia*, 429 U.S. 122 (1976) (per curiam). Petitioner did not face the death penalty here. Nor is this a case in which a juror was excluded on grounds that violate the juror's equal protection rights (such as the juror's race or sex). See *J.E.B.* v. *Alabama ex rel. T.B.*, No. 92-1239 (Apr. 19, 1994), slip op. 15 n.13. Outside of those settings, exclusions to which the

At bottom, petitioner's claim implies that he has the right to have a particular juror sit on his jury; the Sixth Amendment, however, guarantees the defendant only an "impartial jury." Petitioner has not questioned the impartiality of the jury he received; therefore, he has established no Sixth Amendment violation.

2. Petitioner argues that he was denied an adequate opportunity to cross-examine government witness Jay Zaden because the trial court refused to order the government to disclose certain information about Zaden. Pet. 10-17. Petitioner further asserts that the decision in *United States* v. *Sanchez*, 988 F.2d 1384 (5th Cir.), cert. denied, 114 S. Ct. 217 (1993), on which the court of appeals relied (Pet. App. 5a), conflicts with *Smith* v. *Illinois*, 390 U.S. 129 (1968).

a. In *Smith*, the Court reversed the conviction of a defendant who was prevented from eliciting the name and address of a witness testifying under a pseudonym. The witness was likely an informant for the police, and he was the only witness to a hand-to-hand drug transaction. 390 U.S. at 130-131. The Court held that the defense required the witness's identity in order to place him in his proper setting and thereby seek to challenge his credibility. *Id.* at 131-133.

Smith did not, however, hold that a witness's identity can never be withheld, regardless of the countervailing

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defendant might object do not prevent the jury from attaining the impartiality required by the Sixth Amendment. See *Holland* v. *Illinois*, 493 U.S. 474 (1990). Nor is there any conflict between this case and *United States* v. *Salamone*, 800 F.2d 1216 (3d Cir. 1986) (Pet. 9). That case involved the systematic exclusion of National Rifle Association members in a firearms prosecution, following inadequate voir dire of whether such persons were biased. *Salamone* did not hold, or suggest, that a single erroneous exclusion, following adequate voir dire, would warrant a new trial.

interest in confidentiality. In *Roviaro* v. *United States*, 353 U.S. 53, 58-62 (1957), the Court explained that the government will often have a legitimate interest in protecting the identity of a confidential informant, despite the defendant's desire to elicit it on cross-examination. The Court held that the government's interest in nondisclosure must be weighed against the defendant's right to obtain information necessary to his defense. *Ibid.* Observing that the issue of whether disclosure should be made "depend[s] upon the particular circumstances of each case," the Court declined to establish a "fixed rule with respect to disclosure." *Id.* at 62. Instead, the Court left it to the lower courts to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Ibid.*

In implementing the balancing of interests required by *Smith* and *Roviaro*, the Fifth Circuit considers: "1) the informant's degree of involvement in the crime, 2) the helpfulness of the disclosure to the defense, and 3) the Government's interest in nondisclosure." *Sanchez*, 988 F.2d at 1391 (citations omitted). Petitioner takes issue (Pet. 15) with the second criterion, but that criterion is fully consistent with *Smith* (which focused on the defense need for the information in question) and involves precisely the type of balancing described in *Roviaro*.

Moreover, unlike the situation in *Smith*, the district court here investigated *in camera* Zaden's prior criminal history and the nature and extent of his prior undercover activities. The court supplied that information to defense counsel, who used it to cross-examine Zaden. Petitioner, therefore, was not denied the "most rudimentary inquiry" that was denied the defendant in *Smith*, 390 U.S. at 131; rather, he was given the informa-

tion necessary for the thorough cross-examination of Zaden.[4]

b. In any event, any error in the degree of disclosure afforded to petitioner was harmless beyond a reasonable doubt. See *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). Contrary to petitioner's suggestion, he was given wide latitude in cross-examining Zaden about the instant offense, his prior criminal activity, and his participation in earlier Customs Service operations. The court itself disclosed to defense counsel that Zaden had received between $40,000 and $50,000 for his service as a confidential informant in earlier cases. Petitioner's trial counsel established during cross-examination that Zaden was an alien who had been granted leave to remain in the United States by the government, that he had been working as a paid informant for about three and one-half years before the present investigation began, that he had received cash awards exceeding $50,000 from the Customs Service, and that he had failed to report most of that money on his income tax returns. Counsel also examined Zaden about his prior criminal activity and learned that "Zaden" was not the witness's birth name, but that it had been legally changed in 1985. The only restriction placed on defense counsel involved disclosure of Zaden's birth name, his current address, and the location of his prior criminal activity and participation as a government

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[4] Petitioner is not assisted by his reliance (Pet. 15) on *United States* v. *Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993). There, the court considered the government's obligations, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose prior felony convictions of an informant. Such disclosure was made here; this case involves the distinct question of whether the court properly determined that revelation of the informant's identity would endanger his safety.

informant. In light of the ample impeachment material brought out by petitioner on cross-examination of Zaden, any error in the court's refusal to require disclosure of the additional information was harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

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